

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

JOHN ORR

Respondent

HUDALJ 92-1861-DB

Decided: November 10, 1992

Mark D. Mungello, Esq.
For Respondent

Robin E. McMillan, Esq.
For the Department

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

This proceeding arose pursuant to 24 C.F.R. 24.100 *et seq.* as a result of an action taken by the Assistant Secretary for Housing-Federal Housing Commissioner of the U.S. Department of Housing and Urban Development ("HUD") on April 23, 1992, proposing to debar John Orr ("Respondent"). If debarred, Respondent would be prohibited from participating in primary covered transactions and lower-tier covered transactions as either a participant or principal at HUD and throughout the Executive Branch of the Federal Government and from participating in procurement contracts with HUD.

This action was taken by HUD based on Respondent's conviction for violation of 31 U.S.C. §§ 5324(3) and 5322(a), and 18 U.S.C. §§ 982 and 2; and because Respondent pleaded guilty to violation of 18 U.S.C. §§ 201(b)(1) and 1503. HUD proposed to debar Respondent for a period of five years beginning June 14, 1991. Respondent was also suspended pending the outcome of any hearing on the proposed debarment.

Respondent requested a hearing on the proposed debarment by a letter to HUD's Inspector General and Administrative Proceedings Division on May 27, 1992. Because the action is based solely on a conviction, the hearing in this case is limited

under

24 C.F.R. § 24.313(b)(2)(ii) to submission of documentary evidence and written briefs. An Order dated June 9, 1992, established a schedule for filing briefs. In compliance with that schedule, as modified by subsequent orders, HUD filed its brief on June 30, 1992,

Respondent filed his reply on August 19, 1992, and HUD filed its response on September 8, 1992.

This matter is now ripe for decision.

Findings of Fact

1. At all times relevant to this proceeding, Respondent was a landlord participating in HUD's Section 8 program in Chester, Pennsylvania. Respondent had contracts with the Chester Housing Authority to receive Section 8 rental subsidies for properties he owned individually and through his companies, Oaklyn Consolidated, Inc. and Oaklyn Estates, Inc. Respondent received a direct pecuniary benefit through his participation in HUD's Section 8 program. HUD Br. at 4; Resp. Br. at 1.¹

2. On May 2, 1991, a five count indictment ("Indictment 1") filed in the United States District Court for the Eastern District of Pennsylvania ("District Court"), charged Respondent with violations of 31 U.S.C. §§ 5324(3) and 5322(a), and 18 U.S.C. §§ 2 and 982. Indictment 1 deals with Respondent's conduct during November and December of 1988. See HUD Br. at 2; Gov't Ex. 1.

3. On or about November 30, 1988, Respondent attended a real estate settlement involving properties located at 125-131 Flower Street and 130-136 Abbott Street in Chester, Pennsylvania, sold by his company, Oaklyn Consolidated, Inc., to the City of Chester. Gov't Ex. 1.

4. Respondent directed a settlement agent from Title Abstract Title Insurance Company ("Title Abstract") to issue him two checks totalling \$17,000 for services purportedly provided by Respondent. Respondent instructed the settlement agent to issue each check in an amount less than \$10,000. *Id.*

5. On or about November 30, 1988 Respondent received two checks from Title Abstract, one for \$8,000 and the other for \$9,000, which he thereafter cashed on different days at the Brookhaven, Pennsylvania office of the Philadelphia National Bank. *Id.*

¹ HUD's brief will be referred to as "HUD Br." followed by a page number; HUD's exhibits will be referred to as "Gov't Ex." followed by the exhibit number; Respondent's brief in opposition will be referred to as "Resp. Br." followed by a page number; and HUD's response will be referred to as "HUD Resp." followed by a page number.

6. Respondent willfully structured these transactions with a domestic financial institution in order to evade the reporting requirements of 31 U.S.C. § 5313(a). *Id.*

7. On or about December 15, 1988, Respondent received a check for \$57,500 as a partial advance payment from the City of Chester for the sale of properties located at 1715-31 West 2nd Street, Chester, Pennsylvania. *Id.*

8. On or about December 19, 1988, Respondent exchanged the \$57,500 check for a series of checks in lesser amounts issued at his direction by a settlement agent from Title Abstract. *Id.*

9. Respondent and others willfully assisted the structuring of these transactions with a domestic financial institution for the purpose of evading the reporting requirements of 31 U.S.C. § 5313(a). *Id.*

10. Respondent was convicted of all five counts of Indictment 1 and on January 16, 1992, was sentenced to serve a term of imprisonment of one year and one day. Gov't Ex. 2.

11. On or about May 1 or 2, 1992, Respondent was charged in a 28 count indictment filed in the District Court ("Indictment 2"). Counts 27 and 28, charged violations of 18 U.S.C. §§ 201(b)(1), 2, and 1503. Gov't 3.²

12. During March through July of 1989, Respondent had several contacts with an undercover F.B.I. agent for purpose of influencing the outcome of a federal grand jury investigation of his co-defendants', Keith Raport and Emilio Diorio, FHA mortgage qualifying activities. Gov't Ex. 3.

13. In his attempt to have the Government's investigation into his co-defendants' alleged fraudulent FHA mortgage qualifying activities dismissed, Respondent paid \$8,000 as a bribe to an undercover F.B.I. agent. *Id.* at pp. 77-82. Gov't Ex. 5.

14. Respondent pleaded guilty to violations of 18 U.S.C. §§ 201(b)(1) and 1503, bribery of a public official and obstruction of justice. Gov't Ex. 5.

15. On February 5, 1992, following his guilty plea, Respondent was sentenced. He was ordered to serve an eighteen month prison term on the bribery and obstruction of justice charges, to run concurrently with his sentence imposed on January 16, 1992.

² On June 14, 1991, HUD's Assistant Secretary for Housing-Fair Housing Commissioner notified Respondent of his suspension. Gov't Ex. 4.

Gov't Ex. 6.

Discussion and Conclusions of Law

1. Respondent is Subject to Debarment Under 24 C.F.R. Part 24

Respondent as a landlord and participant in HUD's Section 8 Program, is considered a "participant" and "principal" in "covered transactions". 24 C.F.R. 24.105(m) and (p); and 24 C.F.R. 24.110(a)(1). Respondent may reasonably be expected to participate in covered transactions in the future.

2. Respondent's Conviction Constitutes Cause for Debarment

Pursuant to HUD's debarment regulations, debarment may be imposed based on conviction for the following causes:

(1) Fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction. 24 C.F.R. 24.305(a)(1).

(2) Embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice. 24 C.F.R. 24.305(a)(3).

(3) Any other offense indicating lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person. 24 C.F.R. 24.305(a)(4).

HUD's regulations also provide that debarment may be imposed for any other cause of so serious or compelling a nature that it affects the present responsibility of a person. 24 C.F.R. 24.305(d).

Respondent does not challenge the existence of cause for debarment. Resp. Br. at 1. Indeed, 24 C.F.R. 24.313(b)(3) provides that cause for debarment must be established by a preponderance of the evidence, a standard deemed met by proof of conviction.

Respondent pled guilty to bribery of a public official and obstruction of justice. Such conduct demonstrates cause for debarment pursuant to 24 C.F.R. § 24.305(a)(3).

Respondent's convictions for structuring financial transactions to avoid currency transaction reporting requirements, aiding and abetting, and criminal forfeiture, clearly demonstrate Respondent's serious lack of business honesty that directly affects his present responsibility to do business with HUD. Such conduct demonstrates cause for debarment pursuant to 24 C.F.R. § 24.305(a)(4).

Because Respondent's convictions, as described above, were criminal offenses

in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction, they are cause for debarment pursuant to 24 C.F.R. § 24.305(a)(1).³

In light of the foregoing, I conclude HUD has satisfied its burden of establishing that cause for debarment exists under 24 C.F.R. 24.305(a)(1), (3) and (4).

3. A Five Year Period of Debarment is Warranted

The existence of cause does not necessarily require that a respondent be debarred. Debarment is a discretionary action and it must be determined whether a respondent's conduct is serious, whether debarment is necessary to protect the public interest, and whether there are mitigating factors. See 24 C.F.R. 24.115(a), (b), and (d). The respondent has the burden of proof for establishing mitigating circumstances. *Id.* at 24.313(b)(4). The period of debarment must be commensurate with the seriousness of the cause(s) and, if suspension precedes debarment, the suspension period shall be considered in determining the debarment period. *Id.* at 24.320(a). The period of debarment for causes such as those present in this case generally should not exceed three years; however, where circumstances warrant, a longer period of debarment may be imposed. *Id.* at 24.320(a)(1).

The debarment process is not intended as a punishment, rather, it protects governmental interests not safeguarded by other laws. *Id.* at 24.115(b). See also *Joseph Constr. Co. v. Veterans Admin.*, 595 F. Supp. 448, 452 (N.D. Ill. 1984). These governmental and public interests are safeguarded by precluding persons who are not "responsible" from conducting business with the Federal Government. See 24 C.F.R. 24.115(a).

"Responsibility" is a term of art which encompasses business integrity and honesty. *Id.* 24.305. See also *Gonzalez v. Freeman*, 334 F. 2d 570, 573 & n.4, 576-77 (D.C. Cir. 1964). Determining "responsibility" requires an assessment of the risk that the government will be injured in the future by doing business with a respondent. See *Shane Meat Co. v. U.S. Dep't of Defense*, 800 F. 2d 334, 338 (3rd Cir. 1986). That

³In its brief HUD set forth 24 C.F.R. 24.305(d). HUD does not argue in its brief that this was a cause for debarment. Moreover, having concluded that cause exists under §§ 24.305(a)(1), (3) and (4), I need not reach whether cause also exists under § 24.305(d).

assessment may be based on past acts, including a previous criminal conviction. See *Agan v. Pierce*, 576 F. Supp. 257, 261 (N.D. Ga. 1983); *Delta Rocky Mountain Petroleum Inc. v. U.S. Dept't of Defense*, 726 F. Supp. 278 (D. Colo. 1989).

Because the type of conduct engaged in by Respondent, which is the cause of his debarment, justifies a period of debarment that generally should not exceed three years, 24 C.F.R. 24.320(a)(1), HUD has the burden of proving Respondent's conduct was such as to justify increasing the standard three year debarment period and Respondent has the burden of establishing sufficient mitigating circumstances to justify shortening the three year debarment period.⁴

HUD argues that Respondent's willful participation in the unlawful structuring of financial transactions demonstrates his lack of ability to deal honestly as a contractor and that his attempt to derail the Government's investigation into fraud in the FHA mortgage program casts further doubt on his ability to deal honestly as a contractor. HUD argues this conduct evinces a flagrant disregard for federal law and fully justifies a five year debarment. HUD Br. at 6-7.

Respondent, although he does not dispute the facts of his convictions, opposes the proposed debarment because none of these crimes directly related to or adversely reflected upon the "excellent manner" in which he had participated in HUD's Section 8 program in the past. Resp. Br. at 1. Further, as another mitigating circumstance warranting the reduction of the debarment period, Respondent argues that he rendered substantial assistance by cooperating in the prosecution of others, for which he received a lesser sentence than would otherwise have been imposed. *Id.*

HUD urges that Respondent's arguments be rejected. HUD argues that there is no proof that Respondent participated in HUD's Section 8 program in an "excellent" manner. HUD argues that the regulations provide that debarment may be imposed for conviction of any offense indicating lack of business honesty. With respect to the argument that consideration should be given to Respondent's cooperation in the prosecution of others, HUD argues it should be rejected because Respondent rendered such assistance only after he pled guilty to obstruction of justice and bribery. HUD Resp. at 1-2.

I am persuaded that Respondent's actions, which were the basis for his convictions, are sufficiently egregious and are of such a nature to justify increasing the debarment from the standard three year period to a five year period, as requested by HUD. In this regard I find the nature of the bribery and obstruction of justice violations to raise grave doubts as to Respondent's responsibility. These violations are extremely serious and exhibit a basic lack of honesty and integrity. Accordingly, in order to protect

⁴ Neither HUD nor Respondent referred to the three year debarment standard in their briefs.

the public interest, a five year period of debarment is appropriate and necessary in order to permit Respondent to demonstrate "responsibility".

The mitigating factors raised by Respondent are not sufficient to convince me that he should be permitted to do business with HUD in less than five years.

Conclusion and Determination

Upon consideration of the public interest and the entire record in this matter, I conclude and determine that cause exists to debar John Orr from participation in primary covered transactions and lower-tier transactions as either a participant or principal at HUD and throughout the Executive Branch of the Federal Government and from participating in procurement contracts with HUD for a five year period from the date of his suspension on June 14, 1991.

SAMUEL A. CHAITOVITZ
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DETERMINATION issued by SAMUEL A CHAITOVITZ, Administrative Law Judge, in HUDALJ 92-1861-DB, were sent to the following parties on this 10th day of November, 1992, in the manner indicated:

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